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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JENNY LISETTE FLORES, *et al.*,

Plaintiffs,

v.

MATTHEW G. WHITAKER, *et al.*,

Defendants.

Case No. CV 85-4544-DMG (AGR_x)

REPLY TO OPPOSITION TO MOTION TO
ENFORCE SETTLEMENT, FOR
PERMANENT INJUNCTION AND FOR
ADJUDICATION OF CIVIL CONTEMPT

Hearing: November 30, 2018

Time: 9:30 a.m.

Room: 1st St. Courthouse
Courtroom 8C

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I. INTRODUCTION

This Court should order Defendants to continue complying with the Settlement notwithstanding their Proposed Rule and any final rule derived therefrom. Defendants nowhere deny that their Proposed Rule is materially inconsistent with the Settlement, nor do they dispute that the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”) precludes them from adopting a final rule that is not substantially the same as the Proposed Rule.

Defendants do not dispute that they have publicly denounced the Settlement repeatedly and vociferously as an impediment to border control; they likewise fail to answer Plaintiffs’ showing that the Proposed Rule’s *raison d’être* is to permit Defendants to do what this Court and the Ninth Circuit have repeatedly ruled they may not: namely, detain children indefinitely in secure, unlicensed facilities.

Nor do Defendants deny that despite repeated entreaties, they even failed to commit to observing the 45-day waiting period Paragraph 40 of the Settlement requires before implementing a final rule and declaring the Settlement terminated.¹

Finally, apart from a boilerplate discussion of ripeness, Defendants fail to contest Plaintiffs’ showing that this Court may enjoin an anticipatory breach of the Settlement. Nowhere do Defendants refute Plaintiffs’ showing that their Proposed Rule constitutes an actionable anticipatory breach.

¹ On November 6, 2018, Defendants asked Plaintiffs to agree to continuing the motion until December 21, 2018. Email between Sarah Fabian and Carlos Holguín, Nov. 6, 2018, Attachment A.

Plaintiffs replied they would not object to the requested continuance so long as Defendants assured they would not implement a final regulation based on the Proposed Rule for at least 45 days following publication of the final rule, or until after the Court rules on the present motion to enforce, whichever should occur later. *Id.*

Defendants never responded to Plaintiffs’ proposal and filed their opposition instead.

1 Defendants nevertheless urge the Court to postpone the inevitable: that is, to
2 delay declaring their Proposed Rule inconsistent with the Settlement—which it
3 plainly is—and to delay enjoining Defendants against implementing final regulations
4 that violate the Settlement. That, however, is a recipe for superfluous confusion and
5 certain irreparable injury to class members. The Court is clearly empowered to enjoin
6 Defendants’ anticipatory breach, and it should do so on the instant motion.

7 II. THE COURT SHOULD ENJOIN DEFENDANTS AGAINST IMPLEMENTING REGULATIONS
8 THAT ARE INCONSISTENT WITH THE SETTLEMENT.

9 In the main, Defendants oppose the instant motion on the theory it improperly
10 seeks to “impede” their rulemaking prerogatives. Defs.’ Opp. at 2, (Doc. #521)
11 (“Opp.”). It does not.

12 First, Defendants *agreed* to exercise their rulemaking authority in conformance
13 with the Settlement. The Court’s enforcing that agreement hardly infringes on
14 Defendants’ lawful prerogatives. *See, e.g., Citizens for a Better Environment v.*
15 *Gorsuch*, 718 F.2d 1117, 1128-29 (D.C. Cir. 1983) (“the requirements imposed by
16 the [consent] Decree do not represent judicial intrusion into the Agency’s affairs to
17 the same extent they would if the Decree were ‘a creature of judicial cloth.’”).²

18 Second, nothing requires the Court to delay ruling on whether Defendants’
19 Proposed Rule discharges their duties under the Settlement.

20 In *Ferrell v. Pierce*, 560 F.Supp. 1344 (D. Ill. 1983), *aff’d*, 743 F.2d 454 (7th
21 Cir. 1984), the district court disapproved *proposed* regulations of the Department of
22 Housing and Urban Development (“HUD”) because they failed to comport with a
23 binding settlement. *Id.* at 1361. The court found HUD’s failure to address conflicts
24 between its proposed rule and the settlement an “anomalous or even ominous

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26 ² Much the same answers Defendants’ argument that the Court’s enforcing the
27 Settlement’s rulemaking clauses somehow violates sovereign immunity and
28 separation of powers. Opp. at 8 n.4. Even were those defenses valid, Defendants
waived them when they voluntarily entered into the Settlement.

1 omission.” *Id.*³ The court cited HUD’s “past conduct” as evidence it would exercise
2 the discretion the proposed rule conferred to violate the settlement. *Id.* at 1365. The
3 court accordingly enjoined HUD against implementing its proposed regulations. *Id.* at
4 1372.

5 Here, Plaintiffs seek to enforce the plain terms of the Settlement. The
6 Settlement is a contract which Congress has twice preserved.⁴ The agreement remains
7 binding until Defendants incorporate children’s substantive Settlement rights into
8 federal regulations. Those regulations may “not be inconsistent” with and must
9 “implement” the Settlement. Settlement ¶ 9; Stipulation Extending Settlement
10 Agreement (Dec. 7, 2001).

11 Defendants are therefore obligated to conform their rulemaking as agreed, yet
12 their Proposed Rule manifests a resolve to do anything but implement the Settlement.
13 Their opposition to the present motion, therefore, proposes the Court stay its hand on
14 a hope and a wish that Defendants’ final regulations might actually implement the
15 Settlement, rather than carry out Defendants’ determination to abrogate it. Given the
16 explicit purpose of Defendants’ rulemaking and their many statements excoriating the
17 Settlement as an impediment to border control, accepting Defendants’ position
18 demands a copious measure of credulity. Nor, given Defendants’ many prior breaches
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21 ³ In *Ferrell* HUD affirmatively moved the court to modify the settlement to conform
22 to its proposed rule. That Defendants here have elected to march unilaterally toward
23 completing their anticipatory breach is even more “anomalous or even ominous” than
was HUD’s approach in *Ferrell*. 560 F.Supp. at 1361.

24 ⁴ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (“HSA”),
25 Trafficking Victims Protection Reauthorization Act, Pub L. No. 110-457, 122 Stat.
5044, *codified in pertinent part at* 8 U.S.C. § 1232 (“TVPRA”).

26 Defendants acknowledge that the HSA savings clause, 6 U.S.C. § 552(a), and its
27 incorporation in the TVPRA, 8 U.S.C. § 1232(b)(1), maintained the Settlement in
28 effect as a consent decree. *Flores v. Sessions*, 862 F.3d 863, 871 n.7 (9th Cir. 2017).

1 of the Settlement, is this action a tabula rasa permitting doubt over whether
2 Defendants' Proposed Rule will in fact spawn inconsistent final regulations.

3 As the Court knows, since 2014 Defendants have repeatedly violated both of
4 the Settlement's fundamental requirements: (i) that they release children to reputable
5 custodians without unnecessary delay; and (ii) that for howsoever long Defendants do
6 detain children, they place them in facilities holding a state license to care for
7 dependent, as opposed to delinquent, children.

8 This Court and the Ninth Circuit have just as repeatedly rejected Defendants'
9 arguments for violating these requirements. Order Re: Plaintiffs' Motion to Enforce
10 Settlement (July 24, 2015) (Doc. #177); Order Re: Response to Order to Show Cause
11 (August 21, 2015) (Doc. #189); *aff'd in relevant part, Flores v. Lynch*, 828 F.3d 898
12 (9th Cir. 2016); Order Granting Motion to Enforce (Jan. 20, 2017) (Doc. #318), *aff'd*,
13 *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); Order Denying Ex Parte Application
14 for Limited Relief from Settlement Agreement (July 9, 2018) (Doc. #455); Order Re:
15 Plaintiffs' Motion to Enforce (July 30, 2018) (Doc. #470). Defendants nevertheless
16 continue to insist, without evidence, that they must jettison the Settlement for the
17 greater cause of border control, this time by dint of rulemaking that itself breaches the
18 Settlement. As in *Ferrell*, Defendants must own their past conduct.

19 In any event, Plaintiffs here ask the Court to enjoin Defendants' *implementing*
20 regulations that violate the Settlement, not their rulemaking itself. *See* [Proposed]
21 Order Enforcing Settlement, etc. (Nov. 2, 2018) (Doc. #516-1), at 1 (proposing that
22 Defendants be "enjoined against *implementing* the Proposed Rule or its material
23 equivalent." (emphasis added)). So long as Defendants continue to abide by the
24 Settlement, inconsistent regulations are beside the point.⁵

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27 ⁵ For years, Defendants have had regulations on the books that conflict with the
28 Settlement. *See* 8 C.F.R. § 236.3 (2018) (restricting release to unrelated adults to
"unusual and compelling circumstances" and allowing placement of children "in any

1 But that is clearly not what Defendants have in mind. Their rulemaking instead
2 aims expressly to abrogate class members' Settlement rights and, indeed, repudiate
3 the agreement in its entirety. There is no reasonable doubt that Defendants are
4 determined to violate the Settlement in the very ways this Court and the Ninth Circuit
5 have repeatedly ruled they may not.⁶

6 If, contrary to their declared purpose, Defendants were to continue adhering to
7 the Settlement despite having adopted inconsistent regulations, the Court's enjoining
8 implementation of those regulations could do them no harm. *Melendres v. Arpaio*,
9 695 F.3d 990, 1002 (9th Cir. 2012) ("The Defendants cannot be harmed by an order
10 enjoining an action they will not take."). But Defendants are in no position to
11 complain if they are taken at their word: they have promised they will violate the
12 Settlement under the aegis of inconsistent regulations, and there is nothing
13 precipitous about the Court's enjoining them against doing so.

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17 Service detention facility having separate accommodations for juveniles" without
18 regard to licensing).

18 Defendants have never contended that these regulations trump the Settlement; they
19 clearly do not. *See* Settlement ¶ 9 ("This Agreement sets out nationwide policy for
20 the detention, release, and treatment of minors in the custody of the INS and shall
21 supersede all previous INS policies that are inconsistent with the terms of this
22 Agreement.").

22 ⁶ Moreover, as Plaintiffs established in their opening brief, at this point Defendants'
23 reconciling a final rule with the Settlement would run afoul of the APA's limitations
24 on a final rule's diverging fundamentally from its proposed version. *See*
25 Memorandum in Support of Motion to Enforce Settlement, etc. (Nov. 21, 2018) (Doc.
26 #516) at 17-18 (citing *Env'tl. Def. Ctr. v. U.S. Env'tl. Protection Agency*, 344 F.3d 832,
27 851 (9th Cir. 2003)).

26 Defendants' conforming their final rule to the Settlement—which they have no intent
27 of doing anyway—would require contorting the Proposed Rule far more than what
28 the APA would allow.

1 III. AN ANTICIPATORY BREACH IS RIPE FOR JUDICIAL REVIEW.

2 Defendants do not contest Plaintiffs’ showing that the Proposed Rule in an
3 actionable anticipatory breach. Instead, they argue that Plaintiffs’ challenge is not
4 ripe until Defendants publish a final rule. Defendants ignore that the Settlement is a
5 contract which the Court may enforce pursuant to standard contract law, including
6 that of anticipatory breach.

7 By its very nature, an “anticipatory breach satisfies prudential ripeness . . .”
8 *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632 (D.C. Cir.), *cert. denied*, __ U.S. __,
9 138 S. Ct. 978 (2018) (citing *Sys. Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1383
10 (D.C. Cir. 1998). “In other words, anticipatory breach is ‘a doctrine of
11 accelerated ripeness’ because it ‘gives the plaintiff the option to have the law treat the
12 promise to breach [or the act rendering performance impossible] as a breach
13 itself.’” *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d
14 285, 294 (4th Cir. 2010) (citing *Franconia Assocs. v. United States*, 536 U.S. 129,
15 143 (2002)).

16 Plaintiffs’ right to sue for anticipatory breach, therefore, does not hinge on
17 Defendants’ completing their breach. Plaintiffs need only show that Defendants
18 intend to repudiate the Settlement. Defendants’ Proposed Rule, public statements, and
19 past conduct leave no doubt that they do. Defendants’ failure to contest Plaintiffs’
20 showing that they are in anticipatory breach—likely because they have no plausible
21 rebuttal to offer—waives opposition. Defendants’ authorities are plainly not to the
22 contrary.⁷

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25 ⁷ None of the authorities Defendants cite involves a settlement: that is, a contract that
26 that may be enforced against anticipatory breach. *See Ohio Forestry Ass’n, Inc. v.*
27 *Sierra Club*, 523 U.S. 726 (1998) (challenge to federal land and resource
28 management plan unconstrained by settlement or consent decree); *Nevada v. Dep’t of*
Energy, 457 F.3d 78 (D.C. Cir. 2005) (no settlement at issue; APA challenge to
environmental impact statement); *Am. Portland Cement All. v. E.P.A.*, 101 F.3d 772

1 There is no impediment to this Court’s adjudicating Defendants in anticipatory
2 breach, and it should do so.⁸

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14 (D.C. Cir. 1996) (same; challenge to EPA determination against regulating cement
15 kiln dust as hazardous waste;).

16 In *West Virginia v. EPA (In re Murray Energy Corp.)*, 788 F.3d 330 (D.C. Cir. 2015),
17 the petitioners did not seek to enforce a settlement, but rather *attacked* an existing
18 agreement between the EPA and several unrelated parties “hop[ing] to obtain a
19 backdoor ruling from the Court that EPA lacks legal authority . . . to regulate carbon
20 dioxide emissions from existing power plants.” *Id.* at 336. The settlement, however,
21 “did not obligate EPA to issue a final rule restricting carbon dioxide emissions from
existing power plants. It simply set a timeline for EPA to decide *whether* to do so.”
Id. (emphasis in original).

22 Here, of course, the Settlement does substantively constrain Defendants’ rulemaking;
23 Plaintiffs are parties to the agreement, and as such, are entitled to enforce it against
anticipatory breach.

24 ⁸ Should it be disposed to defer enjoining Defendants against implementing
25 inconsistent regulations until after publication of a final rule, Plaintiffs respectfully
26 suggest the Court hold the instant motion in abeyance and order the parties to submit
27 simultaneously and within one week of publication supplemental briefs discussing
28 whether Defendants’ final rule cures their anticipatory breach. The motion could
thereafter stand submitted.

1 IV. CONCLUSION.

2 For the foregoing reasons, the Court should grant this motion and enter an
3 order as Plaintiffs propose.
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5 Dated: November 16, 2018

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27
28

Attachment A



From: Carlos Holguín crholguin@centerforhumanrights.org

Subject: Re: Flores Motion - Request for Extension

Date: November 6, 2018 at 1:15 PM

To: Fabian, Sarah B (CIV) Sarah.B.Fabian@usdoj.gov

Cc: Holly S Cooper hscoper@ucdavis.edu, Peter Schey pschey@centerforhumanrights.org, Flentje, August (CIV) August.Flentje@usdoj.gov

Dear Sarah,

Plaintiffs have no objection to your requested extension *provided* Defendants agree they will not implement a final regulation based on the Proposed Rule for at least 45 days following publication of the final rule, or else the Court's disposition of the motion to enforce, etc., whichever should occur later.

—

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On Nov 6, 2018, at 12:55 PM, Fabian, Sarah B (CIV) <Sarah.B.Fabian@usdoj.gov> wrote:

Peter, Carlos, and Holly:

The government requires additional time to respond to your latest motion, and intends to seek an extension of the hearing date to allow for additional response time. We would like to ask to extend the hearing date to December 21. Please let me know asap if Plaintiffs will agree to our requested extension.

Best,
Sarah

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